Supreme Court, U.S.
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No. 91-1203

In The

Supreme Court of the United States

October Term, 1991

HEWLETT-PACKARD COMPANY,

Petitioner,

v.

DATAGATE, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DATAGATE, INC.

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QUESTION PRESENTED

The question raised by petitioner is whether this Court should act to delay the remand of this case to the district court, in accordance with the opinion of the court of appeals, for trial on the remaining issues, when the lower court has not yet rendered a final judgment on the issue which Petitioner argues is presented to this Court in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, NO. 90-1029 (argument submitted December 10, 1991).

LIST OF PARTIES

The caption of this petition identifies all parties in the court of appeals. Respondent Datagate, Inc. has no parent corporation and no subsidiary corporations.

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BRIEF IN OPPOSITION OF RESPONDENT DATAGATE, INC.

Respondent Datagate, Inc. respectfully prays that this Court deny the petition for writ of certiorari filed by Hewlett-Packard Company because the question raised by the petition is not yet properly before this Court.

OPINIONS BELOW

The opinion and the relevant orders of the court of appeals and the district court below are set forth in the appendix to petitioner's brief, as described on pages 1 and 2 of the petition.

JURISDICTION

The memorandum for the court of appeals for the Ninth Circuit affirming the judgment of the district court was entered on April 15, 1991. The jurisdiction of this Court to review the judgment of the Ninth Circuit was invoked under 28 U.S.C. Section 1254(1).

FEDERAL RULE INVOLVED

The relevant federal statutes involved in this matter are Sections 1 and 2 of the Sherman Act, 15 U.S.C., Sections 1 and 2, and Section 16 of the Clayton Act, 15 U.S.C., Section 26, as set forth in petitioner's petition 3-5.

STATEMENT OF THE CASE

1. Introduction.

Respondent Datagate Inc.'s ("Datagate") private antitrust action against Petitioner Hewlett-Packard Company ("Hewlett-Packard") sought damages and injunctive relief. The district court dismissed Datagate's tying claim and granted summary judgment in favor of petitioner with respect to the monopolization claim. The court of appeals remanded the case with respect only to the injunctive relief claim on the theory of monopolization.

In its petition, Hewlett-Packard requests that the decision below be vacated and remanded for decision by the court of appeals after this Court renders its decision in *Eastman Kodak Co. v. Image Tech. Services, Inc.*, No. 90-1029.

2. Facts.

Hewlett-Packard is a manufacturer of computer systems and offers repair and maintenance service in connection with those systems. Repair and maintenance services for Hewlett-Packard systems are also provided by independent service organizations. Datagate is such an independent service organization ("ISO"). Datagate presented evidence in the District Court that Hewlett-Packard changed its service and parts availability policies in a manner which caused damage to potential and existing competitors of Hewlett-Packard, including ISOs. (Petitioner's appendix at 2a, 7a.)

3. Proceedings Below.

The second amended complaint filed by Datagate alleged both monopolization and tying violations by Hewlett-Packard. The district court dismissed the tie-in claim and then partially granted Hewlett-Packard's summary judgment motion as to the monopolization cause of action. (Petitioner's Appendix at 33a, 44a.) In response to motions for reconsideration filed by Hewlett-Packard and Datagate, the District Court granted summary judgment for petitioner. (Petitioner's Appendix at 29a.)

The court of appeals partially affirmed the summary judgment, but remanded for further findings with respect to Datagate's prayer for injunctive relief and reversed the district court's dismissal of the tie-in claim. The court of appeals also denied Hewlett-Packard's request to consider the issue of market definition, which was the subject of an earlier district court denial of Hewlett-Packard's motion for summary judgment. (Petitioner's Appendix at 2a, 7a.)

ARGUMENT

This Court should deny the petition for certiorari because the issue argued by petitioner to be identical to that raised in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, No. 90-1029 (submitted December 10, 1991) is not properly presented in this case.

The market definition issue described by petitioner (Petition at 14-15) was presented to the district court by petitioner's Motion for Summary Judgment, which

motion was denied (Petitioner's Appendix at 38a). The denial of a motion for summary judgment is, absent certain extraordinary circumstances, interlocutory in nature, with no appeal available until after a trial on the merits. *United States v. Florian* (1941) 312 U.S. 656, reh. denied 312 U.S. 715; Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d, § 2715, at p. 636, and cases cited therein at note 24. When summary judgment is granted as to certain claims and denied on others, or summary judgment is granted to one party and denied to the other, the issue upon which summary judgment is denied does not become appealable because it is contained in a case in which the issues upon which summary judgment was *granted* is properly before the higher court. *Pitney Bowes, Inc. v. Mestre* (11th Cir. 1983) 701 F.2d 1365, 1368, cert. denied, 464 U.S. 893 (1983); *Goodyear Tire & Rubber Co. v. Jones* (10th Cir. 1970) 433 F.2d 629.

The court of appeals recognized that the market definition issue was not properly before it (Petitioner's Appendix at 7a):

> "HP also attempts to raise the issue of relevant market definition. However, the denial of a motion for summary judgment is generally not appealable. *Simons v. United States*, 497 F.2d 1046 (9th Cir. 1976)."

Petitioners misstate the basis for this holding of the court of appeals in arguing that the rejection of petitioner's request for consideration of the market definition issue was based on the Ninth Circuit decision in the *Kodak* case (Petition at 13). In fact, the court's reference to the *Kodak* decision was a secondary and alternative ground for not

considering the issue raised by the denial of a motion for summary judgment.

Although this Court has jurisdiction to review interlocutory judgments of federal courts, "this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. R. Co.* (1893) 148 U.S. 372, 384. A petition for certiorari will normally be denied where the issues raised are legal claims denied by the court of appeals, resulting in a remand of the case, because such matters are "not yet ripe for review by this court." *Fireman v. Bangor & A. R. Co.* (1967) 389 U.S. 327, 328.

The denial of certiorari does not constitute an affirmance of the interlocutory order of the court of appeals. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.* (1916) 240 U.S. 251, 258. Further, the denial of certiorari at an interlocutory stage is without prejudice to consideration by this Court of the issue at question when later presented in a final judgment. *Washington v. Washington State, Etc.* (1979) 443 U.S. 658, 672 n. 19. Thus, the denial of this petition will not prejudice petitioner.

Because the market definition issue raised by petitioner is not yet properly on appeal, the issues raised in this case are not identical with those in the *Kodak* matter now before this Court. Therefore, petitioners have failed to demonstrate that the grant of certiorari is appropriate.

CONCLUSION

For the foregoing reasons, this Court should deny this petition for a writ of certiorari.

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